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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 392

CHARLES L. HARNEY CONSTRUCTION COMPANY (Formerly Palm Springs Holding Corporation), PETITIONER

v.

MAJOR GENERAL PHILIP B. FLEMING, INDIVIDUALLY AND AS ADMINISTRATOR, FEDERAL WORKS AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 49-56) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1949 (R. 57). The petition for

a writ of certiorari was filed on October 14, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 23 of the Surplus Property Act of 1944, as originally enacted and as amended, providing a preferential repurchase right in the former owner of surplus real property, confers such right on a dissolved corporation.

2. Whether, under the facts, petitioner is "the person from whom such property was acquired," within the meaning of those words in Section 23 of the Surplus Property Act of 1944 as originally enacted and as amended, and consequently has a preferential repurchase right as a former owner under that section.

3. Whether Section 23 of the Surplus Property Act of 1944 applied to hotels prior to its amendment in 1946.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. App. 1611, *et seq.*, the amendatory Act of August 7, 1946, 60 Stat. 886, 50 U. S. C. App. 1632, War Assets Corporation Regulation of March 6, 1946, 11 F. R. 2644, reissued as War Assets Administration Regulation of June 29, 1946, 11 F. R. 7611, 7612, and Section 399 of the California Civil Code are set out in the Appendix, *infra,* pp. 16-20.

STATEMENT

On February 9, 1948, petitioner filed a complaint against the federal officials charged with disposal of surplus property to secure a judgment declaring that petitioner had a preferential right to repurchase the Hotel El Mirador in California (R. 2-12). Upon facts appearing in an affidavit executed by respondent Philip B. Fleming (R. 25-44) and an affidavit of John J. Courtney filed by the petitioner (R. 44-46), the trial court concluded that there was no genuine issue of fact and that petitioner was entitled to summary judgment declaring it to be in possession of the repurchase right of a former owner under Section 23 of the Surplus Property Act, both as originally enacted and as amended (R. 47-48).

The undisputed facts may be summarized as follows:[1]

By condemnation proceedings, the United States, on June 22, 1942, acquired title to certain real property in California consisting of 28 acres of land on which stood the El Mirador Hotel, for an agreed value of $425,000.00. The owner of the hotel at the time it was acquired by the United States was the Palm Springs Holding Corporation, a California corporation. On September 2, 1942, the Board of Directors of that corporation adopted a resolution authorizing the sale of all assets of the

[1] The case being disposed of on a motion for summary judgment, the district court did not enter findings of fact and conclusions of law (Rule 52(a), F.R.C.P.).

corporation, except cash on hand, to its two principal stockholders, Warren B. Pinney and Ralph D. Lacoe, Jr., for the sum of $750.00. This was accomplished by a bill of sale executed on September 15, 1942. Thereafter, the only asset of the corporation, after the purchase of some of its own capital stock, consisted of cash on hand in the sum of approximately $235,000.00. (R. 27-28.)

Sometime prior to October 1, 1942, Pinney and Lacoe acquired control of all outstanding stock of the Palm Springs Holding Corporation, and, on that date, they transferred all of the stock of the corporation to Charles L. Harney, P. E. Harney, Henry F. Wrigley, and C. J. Carroll (R. 28). These four individuals had been engaged in the general contracting business in San Francisco, California. They wished to continue the construction business under the corporate form, but did not want to take the time that formation of a new corporation would require. There was also an advantage to them for tax purposes in acquiring the skeleton of a corporation with an equity invested capital of approximately $600,000.00 and a possible capital loss on the sale of its assets of approximately $148,000.00. The Harneys and their associates paid $260,000 for the stock of the corporation, the only asset of which was approximately $235,000.00 in cash. (R. 28.)

On October 2, 1942, the day following the acquisition of the stock by the Harneys, the new owners called a directors' meeting, elected new officers,

and passed a resolution amending the Articles of Incorporation by (a) changing the name of the corporation to the Charles L. Harney Construction Company, (b) eliminating the provisions for carrying on a hotel business, substituting therefor authority to carry on a general contracting business, and (c) changing the principal office of the corporation from Los Angeles to San Francisco. Thereafter the Charles L. Harney Construction Company carried on a general contracting business but did not engage in any way in the hotel business. On November 2, 1944, the Charles L. Harney Construction Company filed a certificate of election to dissolve with the Secretary of State of the State of California, and the company was dissolved pursuant to a certificate of dissolution dated June 28, 1945, and filed with the Secretary of State on August 4, 1945. (R. 28-29.)

The former El Mirador Hotel was declared surplus in February 1946, under the Surplus Property Act of 1944, 58 Stat. 765, Section 11, 50 U. S. C. App. 1620. On March 4, 1946, the property was classified by the War Assets Corporation as "commercial tract, improved." By regulations of the War Assets Corporation (11 F. R. 2644) and of the War Assets Administrator (11 F. R. 7611), the classification of the property as "commercial tract, improved" eliminated it from the definition of "section 23 real property" as used in the Surplus Property Act of 1944, and, consequently, the property

under those regulations was not subject to a former owner's priority under that Act (R. 29).

Pursuant to Section 10 of the Surplus Property Act of 1944, the property was assigned to the Federal Works Agency on March 15, 1946, for disposition. The property was advertised and bids were received which included (1) a bid in the sum of $700,000.00, the adjusted purchase price for former owners, received from the petitioner, Charles L. Harney Construction Company; (2) another bid in the sum of $700,000.00 received from Warren B. Pinney and Ralph D. Lacoe, Jr., also claiming to be former owners; (3) a bid in the sum of $1,150,000.00 under a veteran's priority by Irwin Frank and Lloyd W. Gardner, and (4) ten non-priority bids in the sum of $1,050,000.00 or less (R. 29-30).

When petitioner raised the question of its right as a former owner of the property, respondent Fleming determined administratively that petitioner was not a priority former owner within the meaning of Section 23 of the Surplus Property Act of 1944, as amended by the Act of August 7, 1946, 60 Stat. 886, attaching to his letter so stating a copy of an opinion by the General Counsel of the Federal Works Agency (R. 35-43). In seeking a ruling on its rights, petitioner had relied upon (1) a letter of the Secretary of State of California, dated June 2, 1947, expressing the view that the Surplus Property Act of 1944 conferred a repurchase right upon petitioner which constituted an

asset within the meaning of Section 399 of the California Civil Code which petitioner corporation is empowered by state law to pursue, notwithstanding its dissolution (R. 13-14), and (2) an order of the Superior Court of the State of California in and for the City and County of San Francisco, California, dated June 3, 1947, procured by petitioner in *ex parte* proceedings, authorizing petitioner to submit a claim as former owner and to purchase the property at the adjusted price and to borrow the necessary money from its shareholders (R. 18-20). Following rejection of its claim, petitioner obtained a further order of said court dated September 5, 1947, also in *ex parte* proceedings, declaring that the right of a former owner, whether under the Surplus Property Act of 1944 as originally enacted, or as amended in 1946, is an asset of petitioner corporation omitted in the winding-up process, within the meaning of Section 399 of the California Civil Code, and authorizing the filing of an offer, petition, complaint or other proceeding to realize upon the asserted asset (R. 24-25). By letter of February 2, 1948, respondent Fleming adhered to his previous ruling and this action was thereupon instituted (see R. 9).

Finally, the affidavit of John J. Courtney, filed by petitioner (R. 44-45), recites that agreements had been concluded on and after July 28, 1947, between those who held stock in the Palm Springs Holding Corporation as of June 22, 1942, and the shareholders of petitioner Harney Construction

Company, whereby it was agreed that petitioner would represent the legal and equitable rights of both the former shareholders of Palm Springs Hotel Corporation and the subsequent shareholders of petitioner Harney Construction Company, and that "both groups of stockholders would share in the benefits" derived from the exercise of the former owner right.

On these facts, the district court held that petitioner was in possession of the repurchase right of a former owner (R. 47-48). The court of appeals reversed the judgment and remanded the case with directions to enter judgment for respondents. In so doing, the court of appeals held that the Surplus Property Act of 1944, as amended, conferred no former-owner repurchase right on corporations dissolved prior to the time property is declared surplus, that petitioner is not the former owner of the property within the meaning of the statute, and that the Act, as originally enacted, did not apply to hotel property (R. 49-56).

ARGUMENT

1. This case does not present any question of long-range importance since all priorities provided by the Surplus Property Act expire on December 31, 1949. Act of June 30, 1949, sec. 502(a)(1), Pub. No. 152, 81st Cong. 1st sess. Nor does it, as petitioner asserts (Pet. 8), present any question of the weight and effect to be accorded state law and state court rulings "on the capacity of a dissolved

corporation of that State." The court below conceded (R. 56) that under California law petitioner has a limited technical existence, even after dissolution, to prosecute claims to realize upon assets which it had at the time of its dissolution, even though they do not become collectible until sometime after dissolution. And it conceded that petitioner has capacity to prosecute its claim to a former-owner priority right and realize upon that claim if the right exists.

But there is a manifest distinction between the question of capacity to exercise a right and the question whether the right exists. Here petitioner claims a right to purchase United States property. Clearly no such right can arise under state law. Petitioner necessarily claims the right under federal law, the Surplus Property Act. In deciding that the right does not exist in petitioner, the court of appeals did not decide that petitioner lacks capacity to make the claim, but decided only the purely federal question, whether the Surplus Property Act confers the right on a party in petitioner's status. Petitioner's assertion of a conflict "in principle" (Pet. 9) is therefore baseless.

2. The court of appeals correctly held (R. 56) that the Surplus Property Act does not confer the right to repurchase upon a dissolved corporation. Clearly no right to repurchase accrued under the statute here involved until the property was declared surplus in 1946. Prior to that time, there

was only a possibility that the right might come into being. In 1946 petitioner was already dissolved (R. 29). As a general proposition, statutes conferring rights on corporations would not be construed as applicable to dissolved corporations, absent express language to that effect. At common law "and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person." *Oklahoma Gas Co.* v. *Oklahoma,* 273 U. S. 257, 259. See also *Defense Supplies Corp.* v. *Lawrence,* 336 U. S. 631, 634. Moreover, we are here dealing with a statute which confers a gratuity on former owners at a sacrifice of the public interest. Thus, in this case, the adjusted price to a former owner is $700,000.00, but the Government has nonpriority bids as high as $1,150,000.00 (R. 30). Such statutes are subject to strict construction, and one claiming to be a beneficiary has the burden of establishing his right beyond doubt. *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, 257.

It is submitted that only express language in the statute would justify a holding that Congress intended that a defunct corporation could be exhumed for the sole purpose of allowing its former stockholders to make a profit of $450,000.00 at the taxpayers' expense. Not only can petitioner point to no such language but, as the court of appeals pointed out (R. 55), the statute expressly deals with the contingency of former owners passing

out of existence prior to the time property is declared surplus, and did so in terms which exclude dissolved corporations. Section 23(g) (Appendix, *infra,* p. 17) provides for survival of the right to the "spouse and children" of a former owner, clearly limiting survival to the case of deceased *individual* former owners and even there only to certain heirs. It is not the province of the courts to extend the right further than Congress has seen fit to go.

Petitioner in effect recognizes that dissolved corporations are not within the statute by its heavy reliance on Section 399 of the California Civil Code. But that statute does not aid petitioner. It provides (Appendix, *infra,* p. 19) in general terms for a limited technical existence for the sole purpose of winding up its affairs, collection of assets and payment of debts. It is the counterpart of probate laws for winding up an individual decedent's estate. And the statute no more indicates corporate life in petitioner than do probate statutes indicate life in a decedent.

3. But even if the former owner right of the Surplus Property Act be thought to extend to dissolved corporations, under the undisputed facts the court of appeals correctly decided (R. 54) that petitioner is not, in any event, the former owner of the property involved. Section 23(d) (1) (A) of the Surplus Property Act (Appendix, *infra,* p. 17) gives the former owner right to "the person from

which such property was acquired." The object of Congress was to favor those "unwilling owners" from whom the Government had to take property for war purposes. (H. Rept. No. 1757, 78th Cong. 2d sess., p. 12). Petitioner in no sense qualifies. To allow petitioner's claim would simply give a windfall of $450,000.00 to individuals from whom the Government took nothing and who have no claim, moral or otherwise, upon the United States.

On October 1, 1942, Charles L. Harney and P. E. Harney purchased all of the stock of Palm Springs Holding Corporation, from which corporation the Government had previously acquired the property in question.[2] At that time, the only asset of Palm Springs Holding Corporation was $235,000.00 in cash, and the Harneys paid $260,000.00. Simple subtraction shows that the transaction constituted a purchase of a corporate front and nothing else for $25,000.00. It was entered into to avoid the delay which formation of a new company would entail. At the time the Harneys acquired the stock, the hotel property was already owned by the Government. The right they now claim was not in prospect in 1942 and they paid nothing on that account. The complete lack of identity between petitioner and Palm Springs Holding Corporation is further shown by the fact that the Harneys immediately changed the name of the corporation, amended its charter by eliminating the provision for doing a hotel business and substituting therefor

[2] Only qualifying shares went to Henry F. Wrigley and C. J. Carroll, the Harneys' associates (R. 28).

a provision for the carrying on of their general contracting business, and changing the principal office from Los Angeles to San Francisco.

It follows that the Harneys have no just claim to the benefit of the statute. Refuge in the technicalities of corporate entity (Pet. 15) cannot confer on individuals having not the slightest claim against the Government a windfall of $450,000.00 to the detriment of the Government.[3]

4. In sustaining the administrative construction of Section 23 of the Surplus Property Act of 1944, as originally enacted, as not applying to commercial properties, the court of appeals had before it the legislative history of that statute showing the purpose of Congress to limit the former owner right to former owners of farm property acquired by the Government. The question of the scope of the 1944 Act is described by petition (Pet. 16) as "subsidiary". It actually is of little or no importance here or generally. The statute was amended in 1946 specifically to include hotel property. And if, as held by the court of appeals, petitioner's being dissolved prior to the

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[3] Petitioner refers (Pet. 15) to an agreement between the Harneys and former shareholders of Palm Springs Holding Corporation to share benefits. This is irrelevant. The former stockholders of Palm Springs Holding Corporation clearly have no right as against the United States. And if, as the court of appeals held, petitioner has no right, such right cannot be established simply by agreement to share proceeds. Additionally, neither the former stockholders nor petitioner, if either had a right, could assign any part of it to the other. (Sec. 23(g), Surplus Property Act of 1944, Appendix, *infra*, pp. 17-18.)

time the property was declared surplus, and petitioner's lack of identity with the former owner preclude it from being a former owner within the purview of the statute, these grounds for denial of petitioner's claim are unaffected by the question of whether such property was included in the law in 1944 or in 1946. If on the other hand, petitioner is a former owner and its dissolution is deemed irrelevant, its rights are complete under the 1946 Act and reference to the 1944 Act becomes unnecessary. Only if the date of petitioner's dissolution became crucial might the meaning of the 1944 Act conceivably assume some significance. That possibility is so remote here and so unlikely to arise in other cases that certiorari would seem to be plainly unwarranted. For reasons already stated, *supra,* pp. 8-9, 11, petitioner's discussion of Section 399 of the California Civil Code in this connection (Pet. 17) is unavailing, as is its reference to the *ex parte* rulings of the state court.[4]

[4] The state court's rulings (R. 18-20, 24-25) may be accepted as determining petitioner's capacity to prosecute its claim; those rulings (R. 18-20, 24-25), correctly appraised, go no further. Obviously, the state court could not determine the question of petitioner's right under federal law in *ex parte* proceedings.

CONCLUSION

The decision below is correct, there is no conflict, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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NOVEMBER 1949

APPENDIX

The pertinent portions of the Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. App. 1611, *et seq.*, read as follows:

> Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> * * * * *
>
> (q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;
>
> * * * * *
>
> (t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.
>
> Sec. 3. As used in this Act—
>
> * * * * *
>
> (h) The term "person" means any individual, corporation, partnership, firm, association, trust, estate, or other entity.
>
> Sec. 23 (a), as used in this section—
>
> (1) The term "real property" means property consisting of land, together with any fixtures and improvements thereon, located outside of the District of Columbia, but does not include war housing, industrial plants, factories, or similar structures and facilities, or

the sites thereof, or land which the Board determines is essential to the use of any of the foregoing; and

(2) The term "surplus real property" means real property which has been determined under section 11 to be surplus property.

* * * * *

(d) (1) (A) In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom such property was acquired shall be given notice, in such manner (which may include publication) as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice * * *.

(B) * * *

* * * * *

(3) The price to be paid for surplus real property sold under this subsection shall be a price not greater than that for which it was acquired by the United States, such acquisition price being properly adjusted to reflect any increase or decrease in the value of such property resulting from action by the United States, or a price equal to the market

price at the time of the sale of such property, whichever price is the lower.

* * * * *

(g) In the case of the death of a person entitled under this section to rights as a former owner or veteran, his spouse and children, in that order, shall succeed to such rights of the decedent existing at the time of his death. * * * No preference right may be assigned or exercised by power of attorney or through a power to select except as may be permitted by regulations prescribed by the Board in order to prevent the loss of such right by the holder thereof.

War Assets Corporation Regulation of March 6, 1946, 11 F. R. p. 2644, issued under the authority of the Surplus Property Act of 1944, and War Assets Administration Regulation of June 29, 1946, 11 F. R. 7611, issued under the same authority, each provided as follows:

§ 8305.2(11). "Section 23 real property" means property consisting of land, together with any fixtures and improvements thereon, located outside of the District of Columbia, but does not include war housing, industrial plants, factories, or similar structures and facilities, or the sites thereof, or land which the Administrator determines is essential to the use of any of the foregoing. "Similar structures and facilities" as used above shall include structures and facilities classified by the Administrator as (1) commercial * * *.

Section 1 of the Act of August 7, 1946, 60 Stat. 886, 50 U. S. C. App. 1632, provides:

> That section 23 (a) (1) of the Surplus Property Act of 1944 is amended to read as follows:
>
> "(1) The term 'real property' means property consisting of land, together with any fixtures and improvements thereon (including hotels, apartment houses, hospitals, office buildings, stores, and other commercial structures) located outside the District of Columbia, but does not include (A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C) war housing, industrial plants, factories, airports, airport facilities, or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing; * * *".

Section 399 of the California Civil Code reads as follows:

> § 399. *Continuation of corporation after dissolution.* A corporation which is dissolved by the expiration of its term of existence, by forfeiture of existence by order of court, or otherwise, nevertheless shall continue to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and

collect and divide its assets, but not for the purpose of continuing business except in so far as necessary for the winding up thereof. No action or proceeding to which a corporation is a party shall abate by the dissolution of such corporation or by reason of proceedings for dissolution and winding up thereof.

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation for the benefit of the person entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly.

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